Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROBERT A. LEVY and PHYLLIS B. LEVY,

Petitioners,

vs.

SWIFT TRANSPORTATION COMPANY
(Sparks, Nevada), et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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5600

QUESTIONS PRESENTED

Are civil litigants entitled to obtain and present evidence before their case is dismissed on grounds of the statute of limitations, in a case involving allegations of conspiracy against an agency of the United States?

Are pro se plaintiffs who are unable to obtain counsel entitled to amend their complaint to correct obvious deficiencies before it is dismissed on grounds of the statute of limitations, in a case involving allegations of conspiracy against an agency of the United States?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Swift Transportation Company (Phoenix, Arizona), Jerry C. Moyes, Keith Dale Nichols, Eddie Lee Tiggs, The United States of America, and its agency The Central Intelligence Agency were parties before the court of appeals.

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Petitioners, Robert A. Levy and Phyllis B. Levy, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit is not published but is included herein (App.A). The Memorandum Opinion and Order of the district court in Levy v Swift et al., Civ. No. 98-578 LH/WWD, dismissing plaintiffs' complaint is not published but is included herein (App.B). The Memorandum Opinion and Order of the district court denying plaintiffs' Rule 59 Motion to Alter or Amend Judgment is not published but is included herein (App.C). The Memorandum Opinion and Order of the district court staying discovery is not published but is included herein (App.D).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") was entered on September 21, 1999. The Court of Appeals denied a timely petition for rehearing on November 15, 1999. (App.E).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall... be deprived of life,

liberty, or property, without due process of law...."

Federal Rule of Civil Procedure 15(a) provides:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served..... Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Federal Rule of Appellate Procedure 3(c) provides:

..... A notice of appeal must also designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken.....

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The jurisdiction of the federal court arises from the following statutes:

28 USC 1346(b), which provides for exclusive jurisdiction of the federal courts for tort claims against the United States.

28 USC 1367, which provides for supplemental jurisdiction of the federal courts over all other claims that form part of the same case that has federal jurisdiction.

STATEMENT OF THE CASE

The fundamental question in this case is whether pro se litigants are entitled to obtain evidence or amend their complaint before their case is dismissed on grounds of the

running of the statute of limitations. It arises in the context of the dismissal of the lawsuit of Robert and Phyllis Levy and their motion under Rule 59 to grant them leave to amend their complaint. To fully appreciate the significance of the issues presented by this case, it is essential to consider its lengthy factual background.

A. Statement of Facts

On July 20, 1994, while the Levys were traveling in a private automobile in New Mexico, they were the victims of an accident involving two other vehicles, a truck owned by Swift Transportation Company and driven by Keith D. Nichols, and an automobile driven by Eddie L. Tiggs (App.F).

The circumstances of the accident indicated that it was not a case of negligence but was the result of an orchestrated plan or conspiracy. During the following months the Levys attempted to collect the facts. They visited the accident scene several times. They interviewed the officers who arrived at the scene. They took pictures. They collected information about the known participants, Swift Transportation Company (Swift), Keith Nichols, and Eddie Tiggs. They learned that Swift had acquired the assets of MNX Trucking Company in the summer of 1994. Robert Levy began a study of the field of accident reconstruction.

They also attempted to obtain counsel to represent them. They interviewed more than a dozen attorneys, but none would accept the case except as a straight negligence case (App.F at 28a).

In July, 1995, the Levys purchased a book entitled *Defrauding America* by Rodney Stich. As they read the book, they ran across a footnote (at 298) containing a statement that

MNX Trucking was a "CIA-related drug hauler". This statement was of considerable interest to the Levys because they had suspected that they had been targets of the Central Intelligence Agency ever since Robert Levy worked for the National Radio Company in the 1960's. After leaving the employ of National Radio, Robert learned that it was a front organization for the CIA. (See details as set out in their proposed Second Amended Complaint, App.F, Sixth Claim, Continuing Conspiracy, at 30a).

Based on the above information, the Levys concluded that the accident in which they were involved was the result of a conspiracy involving the CIA. They continued to try to get legal representation. In August, 1995, they told attorney Neil Weinbrenner about the involvement of the CIA. In subsequent months they also told attorneys Gerry Spence and Joseph Arshawsky about the CIA's involvement. None of these attorneys informed them about the requirements of the Federal Tort Claims Act or in fact even mentioned the Federal Tort Claims Act (App.F at 28a).

It was not until the spring of 1997, when the Levys, faced with the necessity of representing themselves because of the looming three-year statute of limitations under New Mexico law, that their research led them to discover the Federal Tort Claims Act and its filing requirements. Accordingly, on May 22, 1997, they mailed claims to the CIA pursuant to 28 USC 2401(b).

The Levys continued to seek legal counsel. In February, 1999, they went to the local bar association for help to prepare an amended complaint, but no attorney would give them any assistance (App.F at 28a).

B. The Proceedings Below

On June 6, 1997, the Levys filed their original complaint in Case No. 97-777-SC/JHG in the United States District Court for the District of New Mexico in Las Cruces, naming Swift Transportation Company (Sparks, Nevada) (Swift-S), Swift Ttansportation Company (Phoenix, Arizona) (Swift-P), Jerry Moyes, Keith Nichols, and Eddie Tiggs as defendants. They invoked the jurisdiction of the court under 28 USC 1332, the diversity statute and 28 USC 1367, the Supplemental jurisdiction statute. They explained in their complaint that they intended to add the United States as a party but could not do so until the CIA denied their claims or until six months had passed. All defendants filed responsive pleadings, and then moved to dismiss for lack of diversity jurisdiction. Plaintiffs filed a motion for leave to amend their complaint to add the United States as a party, but on April 28, 1998, Judge Santiago Campos denied their motion and dismissed their case without prejudice.

On May 15, 1998, the Levys refiled their case (No. 98-578-LH/WWD) in the United States District Court for the District of New Mexico, adding the United States as a party, including additional conspiracy claims, and adding material to try to correct the deficiencies set out in Judge Campos' order of dismissal.

After filing their complaint, the Levys realized they had failed to include any reference to the case that had been dismissed by Judge Campos, so on May 22, 1998, they filed their First Amended Complaint to include a reference to the other suit.

The Swift defendants (Swift-S, Swift-P, Moyes, and Nichols) filed a responsive pleading, but defendants United

States and Tiggs moved to dismiss on grounds that the statute of limitations had run. On October 16, 1998, Magistrate Judge William Deaton granted an opposed motion by the United States to stay discovery pending rulings on the jurisdictional questions and vacated his Initial Scheduling Order for a Scheduling Conference on October 28 (App.D). On December 30, 1998, Judge Hansen granted the motions to dismiss and again dismissed plaintiffs lawsuit.[1] Judge Hansen's Memorandum Opinion and Order made no reference to the Levys' efforts to obtain evidence or amend their complaint (App B).

On January 11, 1999, the Levys timely filed a Rule 59 motion to alter or amend judgment, including a request for permission to file a motion for leave to file an amended complaint (App.C at 20a). Their Reply Brief on this motion contained a proposed second amended complaint as an Exhibit (App.F).

Judge Hansen erroneously regarded their Rule 59 motion as having been untimely filed and treated it as a motion under Rule 60 (App.C at 20a). On May 14, 1999, well after the time for filing notice of appeal would have expired had their motion actually been untimely filed, he denied it as not qualifying for relief under Rule 60 (App.C at 20a-21a).

The Levys timely appealed to the Tenth Circuit Court of Appeals from the final judgment of the district court, as well as from the denial of their Rule 59 motion, and from the

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[1]On January 28, 1999, in order to protect their rights pursuant to 28 USC 1367(d), plaintiffs filed suit against the non-federal defendants in the Third Judicial District Court of New Mexico, Case No. CV-99-90. Litigation in this case is now underway.

imposition of sanctions on them (App.G). In their Opening Brief they enumerated nine issues on appeal, as follows:

1. That their cause of action accrued within the limitations period.

2. That they established a case of fraudulent concealment against the United States which tolled the limitations period.

3. That they established a case of continuing conspiracy under which their cause of action had not accrued.

4. That they should have an opportunity to file an amended complaint.

5. That they should be allowed to obtain and present evidence before the question of jurisdiction is decided.

6. That the district court abused its discretion in denying their Rule 59 motion.

7. That the sanctions imposed by the district court should be lifted.

8. That the case should be assigned to the district judge who presided over the first case.

9. That if the federal claims are dismissed, the federal court should retain jurisdiction over the remaining claims and defendants.

The Court of Appeals affirmed the district court's Judgment and subsequently denied a petition for rehearing and rehearing en banc without comment. In affirming, the panel failed to address the First and Fifth of plaintiffs' issues (App.A).

The First Issue was the Levys' contention that their claim did not accrue until they discovered the CIA connection in July, 1995. This contention was based on *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct.352, 62 L.Ed.2d 259 (1979), which held that the date of accrual of a claim may depend on a plaintiff's knowledge of the "who" as well as the "what" as the

cause of his injuries. See *Liuzzo v. United States*, 485 F Supp 1274 (E.D.Mich.1980), *Diminnie v. United States*, 728 F 2d 301, 305 (6th Cir. 1984).

The Levys' Fifth Issue, the issue of obtaining evidence, was ignored by the panel because that issue was not explicitly included in their notice of appeal (App.A at 2a), although said named the Final Judgment of the district court, (App.G).

The panel rejected the Levys' Fourth Issue, their request to amend their complaint, on technical grounds that they had not actually filed a motion for leave to amend (App.A at 6a).

The panel rejected the Second Issue, fraudulent concealment, holding that the Levys failed to show due diligence (App.A at 3a-4a), although the district court refused to allow them to obtain or present evidence on this or any other question. (App.D at 22a).

The panel rejected the Third Issue, continuing conspiracy, on grounds that the claim was insufficiently stated, in agreement with Judge Hansen's conclusion (App.A at 4a).

Taken altogether, the import of the panel's position is clear. In refusing to allow discovery and amendment, the order denies a litigant fundamental rights guaranteed by the U.S. Constitution, by the statutes of the United States, by this Court, and by prior decisions of the Tenth Circuit itself.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE ORDER AND JUDGMENT CONFLICTS

WITH THE ESSENTIAL DUE PROCESS RIGHT OF A LITIGANT TO OBTAIN AND PRESENT EVIDENCE BEFORE HIS CASE IS ADJUDICATED.

The Levys' petition for writ of certiorari should be granted because the order and judgment below conflicts with important prior rulings on a litigant's fundamental due process right to a fair trial. *American Sur. Co. v Baldwin*, 287 U.S. 156,168, 53 S.Ct.98 "due process requires that there be an opportunity to present every available defense." The circuit courts have adhered to this principle. See *Complaint of Bankers Trust Co.*, 752 F2d 874,890 (3rd Cir.1984): "Due process mandates that a judicial proceeding give all parties an opportunity to be heard on the critical and decisive allegations which go to the core of the parties' claim or defense and to present evidence on the contested facts," reiterated in *Columbus-American Discovery v. Atlantic Mutual Inc.*, 974 F2d 450,470 (4th Cir.1992), quoting Justice Black, "No judge is granted power...to completely deny a party all opportunity to take depositions or to get affidavits essentially needed to get a fair trial of his case, *First National Bank v. Cities Service Co.*, 391 U.S. 253,306, 88 S.Ct.1575,1601, 20 L.Ed.2d 569,602 (1968)(Black,J., dissenting).

The court of appeals erroneously held that this issue was not properly before the court because the Levys failed to specify it in their notice of appeal (App.A at 2a). But, as stated in their notice of appeal, the appeal was "from the Final Judgment" of the action (App.G at 34a). It is well settled that a notice of appeal which names the final judgment serves to include all interlocutory orders for purposes of satisfying the appellate rule [FRAP 3(c)] that specificity is a jurisdictional prerequisite, *Cole v. Ruidoso Mun. Sch.*, 43 F 3d 1373, 1383 n. 7 (10th Cir. 1994), *Bowdry v United Airlines Inc*, 58 F 3d 1483, 1489 (10th Cir.

1995).[2] The interlocutory order in question is the order by Magistrate Judge Deaton staying discovery and disclosure pursuant to an opposed motion by defendant United States (App.D at 22a). At every step of the proceedings plaintiffs were denied any opportunity to obtain evidence.

The question of the date of accrual of the Levys' claim is the central question of the dismissal of their lawsuit, and they were not permitted to obtain or present evidence relating to this matter. The court of appeals held that they "fail to show they could not have discovered this book [*Defrauding America*] earlier through the exercise of due diligence" (App.A, at 3a-4a). This holding is based on no evidence, only Judge Hansen's assertion (App.B at 14a). Plaintiffs were not allowed to make any showing regarding their exercise of due diligence or of any other of the factual issues crucial to the question of accrual of their claims. See *Health Care Review Inc. v. Shalala*, 926 F.Supp 274, 279-280 (D.R.I. 1996), citing numerous cases to the effect that "the court must, however, afford the non-moving party an ample opportunity to secure and present evidence relevant to the existence of jurisdiction."

The Levys' petition should be granted so that the Court may affirm the importance of its longstanding holdings on due process as regards the right of litigants to be able to be heard on the decisive allegations which go to the core of their claims and to present evidence on the contested facts.

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[2]It should also be noted that the Levys listed the issue of evidence in their docketing statement, which was filed before the statutory deadline for filing notice of appeal, *Denver & Rio Grande Western R. v. Union Pacific R.*, 119 F.3d 847,849 (10th Cir.1997).

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE ORDER AND JUDGMENT CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE RIGHT OF A PRO SE LITIGANT TO AMEND HIS COMPLAINT TO CORRECT OBVIOUS DEFICIENCIES.

The Levys' petition for writ of certiorari should be granted because the Order and Judgment below also conflicts with this Court's prior rulings on the importance of Rule 15(a) in allowing pro se litigants to correct deficiencies of a complaint by amendment, *Boaz v MacDougall*, 454 U.S. 364, 365, 102 S.Ct. 700, 701, 70 L.Ed.2d 551 (1982). "It is settled law that the allegations of a pro se litigant's complaint 'however inartfully pleaded' are held to 'less stringent standards than formal pleadings drafted by lawyers. See also *Foman v Davis*, 371 US 178, 83 S Ct 227, 9 L ed 2d 222, 225 (1962) (refusal to grant leave to amend without any justifying reason appearing for the denial is not an exercise of discretion but an abuse of discretion inconsistent with the spirit of the rules). These holdings are all the more apropriate in this case because of the difficulties faced by the Levys in attempting to secure legal counsel and representation (App.F at 28a).

Plaintiffs' Third Issue on Appeal, the issue of continuing conspiracy, which the district court found to have been incompletely presented (and confirmed by the court of appeals), could easily have been corrected by amendment of the complaint, and in fact was corrected in the proposed amended complaint included in plaintiffs' reply brief to their Rule 59(e) motion (App.F, Sixth Claim, at 30a-33a).

The Order and Judgment below relies on strictly

technical grounds for affirming Judge Hansen's refusal to allow the Levys to amend their complaint (actually a failure to rule since he regarded their Rule 59 motion as untimely, and he also disregarded their request to seek leave to amend prior to dismissal, if necessary)(App.A at 6a). Although their Rule 59 motion requested that the court set aside the judgment to allow them the opportunity to file a motion for leave to file an amended complaint, they did not file a separate motion under Rule 15. The court of appeals relied on a rule enunciated in *Glenn v First Nat. Bank in Grand Junction*, 868 F.2d 368, 371 (10th Cir.1989), namely, that after a motion to dismiss is granted, plaintiff must reopen his case with a Rule 59(e) or Rule 60(b) motion, then file a Rule 15 motion for leave to amend.

The reliance on such a rule violates the spirit of fundamental fairness to pro se litigants. It is not part of the Federal Rules of Civil Procedure or the local rules of the District of New Mexico or the Tenth Circuit, but only the rule of a case with an inapposite factual situation; it directly contradicts the doctrine that under Rule 15 it is not necessary for a formal motion to be filed to allow amendment, *McLaughlin v. Anderson*, 962 F 2d 187, 195 (2nd Cir. 1992): "Of course, the lack of a formal motion is not sufficient ground for a district court's dismissal without leave to amend, so long as the plaintiff has made its willingness to amend clear", *Oliver Schools v Foley*, 930 F 2d 248, 251 (2nd Cir. 1991).

Moreover, the Levys for all practical purposes did comply with the *Glenn* rule--they did file a Rule 59(e) motion and they did indicate a desire to file an amended complaint. And finally, they did file a proposed amended complaint as an Exhibit to their Reply Brief (App.F) on their Rule 59 motion. Such Reply Brief, with its proposed amended complaint, was the functional equivalent of a motion for leave to amend, since the main purpose of such a motion is to acquaint the court and

the other parties with the contents of the proposed amendment[3].

For this reason as well, the Levys' petition should be granted.

CONCLUSION

This case presents questions of exceptional importance--whether a litigant is entitled to obtain evidence relating to the facts crucial to determining when his claims accrued and whether the statute of limitations is tolled; and whether a pro se plaintiff is entitled to amend his complaint when such an amendment would establish his prima facie case. If the Order and Judgment below is allowed to stand, the Levys will have been denied due process and will forever suffer the consequences of never having the facts come to light, facts which may show that an agency of the United States has engaged in activities hitherto known only in banana republics or behind the iron curtain.

Accordingly, the Levys respectfully request that their petition for writ of certiorari be granted.

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[3]Not realizing that the filing of a Rule 59(e) motion constituted a reopening of the case, the Levys asked that the judgment be set aside so they could move for leave to file a motion to amend (App.A at 6a). That was also why they filed their state court action within 30 days of the entry of judgment instead of waiting until disposition of their Rule 59(e) motion (See Footnote 1).

Respectfully submitted

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APPENDIX A - ORDER AND JUDGMENT[1] OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED SEPTEMBER 21, 1999

Appeal No. 99-2167
D.C. No. CIV-98-578 (D.N.M.)

ROBERT A. LEVY and PHYLLIS B. LEVY
Plaintiffs-Appellants

vs.

SWIFT TRANSPORTATION COMPANY et al.,
Defendants-Appellees

Before ANDERSON, KELLY, and BRISCOE
Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P.34(a)(2); 10th Cir. R.34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiffs Robert A. Levy and Phyllis B. Levy appeal the district court's orders denying their motion for assignment of judge, dismissing the case, denying their Rule 59(e) motion to alter or amend judgment, and barring them from filing further

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[1]This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

federal proceedings in this matter. Plaintiffs also argue the district court erred in refusing to allow discovery before dismissing the case. However, this order is not included in plaintiffs' notice of appeal and therefore is not properly before this court for review. See Scaramucci v. Dresser Indus., Inc., 427 F.2d 1309, 1318 (10th Cir. 1970). We affirm.

I.

Plaintiffs originally brought an action in 1997 for damages as a result of a motor vehicle collision on July 20, 1994, and for other damages arising out of a conspiracy. Judge Santiago Campos dismissed the case without prejudice. Plaintiffs again filed a complaint in May 1998 in the present action, which was substantially the same as the original complaint but which added the United States and the CIA as parties and contained additional conspiracy allegations. Judge LeRoy Hansen dismissed the case for lack of subject matter jurisdiction and ordered: "Plaintiffs are prohibited from filing any further proceedings against these Defendants relating to the same subject matter in this district court." Record, Doc. 40 at 11.

II.

Plaintiffs argue the district court erred in denying their motion to assign this case to Judge Campos, who presided over the first case. We review a district court's denial of a motion to recuse for abuse of discretion. United States v. Burger, 964 F.2d 1065, 1070 (10th Cir. 1992).

In their motion, plaintiffs argued it would be appropriate to assign the case to Judge Campos because he was familiar with the case. Plaintiffs made no allegations of bias, prejudice, or impartiality by Judge Hansen. See 28 U.S.C. 455 (discussing

circumstances requiring disqualification of judges). In denying the motion, Judge Hansen found the request was not based on disqualification or any other justifiable reason. Plaintiffs now allege Judge Hansen was biased, as evidenced by his rulings against them. However, these later rulings do not show Judge Hansen was biased at the time he denied the motion to recuse or, for that matter, at the time the rulings were entered. The district court did not abuse its discretion in denying the motion to assign the case to Judge Campos.

III.

Plaintiffs argue the district court erred in dismissing their complaint against all defendants. The court dismissed the case for lack of diversity and for failure to state a claim under Fed.R.Civ.P. 12(b)(6). We review this dismissal de novo. See Ordinance 59 Ass'n v. United States Dep't of Interior Secretary, 163 F.3d 1150,1152 (10th Cir. 1998). Plaintiffs do not appeal the court's dismissal of defendant CIA for lack of subject matter jurisdiction under the Federal Tort Claims Act.

This district court found plaintiffs failed to file their complaint against the United States within the statute of limitations. A tort claim against the United states must be presented in writing to the appropriate federal agency within two years after the claim accrues. 28 U.S.C. 2401(b). The statute of limitations began to run when plaintiffs knew or had reason to know of the existence and cause of the injury that is the basis of their action. See Industrial Constructors Corp. v. United States Bureau of Reclamation, 15 F.3d 963,969 (10th Cir. 1994) (citing United States v. Kubrick, 444 U.S. 111, 121 (1979).

The accident occurred July 20, 1994. Plaintiffs contend they did not know of the CIA connection until July 19, 1965,

and they sent timely notice of their claim to the CIA on May 22, 1997. They contend the statute of limitations was concealed because of fraudulent concealment. To toll the statute of limitations for fraudulent concealment, plaintiffs must show: (1) the United States used fraudulent means; (2) successful concealment from plaintiffs; and (3) plaintiffs did not know or by the exercise of due diligence could not have known that they might have a cause of action. See Ballen v. Prudential Bache Sec., Inc., 23 F.3d 335,336-37 (10th Cir. 1994). The district court found plaintiffs failed to show they could not have discovered the cause of action by the exercise of due diligence.

Plaintiffs made conclusory allegations that the CIA fraudulently concealed its participation in the accident. Even accepting these allegations as true, plaintiffs made no showing they could not have known of the CIA's alleged involvement through the exercise of due diligence. Plaintiffs asserted they did not know of the CIA's connection until someone sent them a book detailing the conspiracy, yet they fail to show they could not have discovered this book earlier through the exercise of due diligence.

Plaintiffs allege the United States is engaged in a continuing conspiracy against them and the statute of limitations did not begin to run until the date of the last tortious act. See Crosswhite v. Brown, 424 F.2d 495,497 (10th Cir. 1970). The district court found all of plaintiffs' claims of conspiracy occurred before the summer of 1994. The court further found plaintiffs' conspiracy claim consisted of conclusory allegations that failed to state a claim for continuing conspiracy. A review of the record confirms the court's conclusion. Plaintiffs failed to allege a continuing conspiracy that would toll the statute of limitations or state a cause of action. The district court did not err in dismissing plaintiffs' claims against the United States.

After dismissing plaintiffs' claims against the United States and the CIA, the district court dismissed the remaining defendants for lack of complete diversity. Diversity jurisdiction requires complete diversity--each defendant must be a citizen of a different state than plaintiff. Harris v. Illinois-California Express, Inc., 687 F.2d 1361,1366 (10th Cir. 1982)(quoting Owen Equip. and Erection Co. v. Kroger, 437 U.S. 365 (1978)). Plaintiffs and two defendants were residents of Texas, creating a lack of diversity.

Plaintiffs argue the district court should have exercised supplemental jurisdiction over the state law claims under 28 U.S.C. 1367(a). We review the district court's decision to decline supplemental jurisdiction for abuse of discretion. Gold v. Local 7 United Food and Commercial Workers Union, 159 F.3d 1307,1310 (10th Cir. 1998). The most common response to a pretrial disposition of federal claims is to dismiss the state law claims without prejudice, Roe v. Cheyenne Mountain Conference resort, Inc., 124 F.3d 1221,1237 (10th Cir. 1997). The district court could decline supplemental jurisdiction after it dismissed all of the claims over which it had original jurisdiction. See 28 U.S.C. 1367(c)(3). There is no indication the district court abused its discretion in declining supplemental jurisdiction over plaintiffs' state law claims.

IV.

Plaintiffs contend the district court erred in finding their Rule 59 motion to alter or amend the judgment was untimely and in treating the motion as one for relief from judgment under Rule 60. Plaintiffs had ten days from the district court's entry of judgment to file their motion to alter or amend. Fed. R.Civ.P.59(e). The court entered its judgment on December 30, 1998, and plaintiffs filed their motion to alter or amend on January 11, 1999. The district court erred in finding the motion

was untimely. See Fed.R.Civ.P.6(a)(when time allowed is less than eleven days, do not include Saturday, Sundays, or legal holidays).

Denial of a Rule 59 motion for untimely filing is harmless error if there was no basis for granting the motion on its merits. See Monod v. Futura, Inc., 415 F.2d 1170,1175 (10th Cir.1969). A Rule 59(e) motion to alter or amend the judgment should be granted only "to correct manifest errors of law or to present newly discovered evidence." Phelps v. Hamilton, 122 F.3d 1309,1324 (10th Cir. 1997). In their motion, plaintiffs sought to set aside the judgment to allow them to file a motion for leave to file an amended complaint, to reconsider dismissing the non-federal defendants, and to clarify the judgment to indicate the dismissal did not prejudice plaintiffs' claims in state court. None of these constitute manifest errors of law or newly discovered evidence. We conclude it was harmless error to deny the motion as untimely.

Plaintiffs also argue the district court erred in not allowing them to file an amended complaint. The record does not indicate that plaintiffs requested leave to file an amended complaint. Their Rule 59 motion requested only that the court set aside the judgment to provide them the opportunity to file a motion for leave to file an amended complaint. Plaintiffs' response to defendants' motion to dismiss also stated they should be allowed to seek leave to amend their complaint. We find no error in the district court's failure to grant plaintiffs leave to amend their complaint when plaintiffs did not make such a request. See Glenn v. First Nat. Bank in Grand Junction, 868 F.2d 368,371 (10th Cir.1989)(after motion to dismiss granted, plaintiff must reopen case with Rule 59(e) or Rule 60(b) motion, then file rule 15 motion for leave to amend).

V.

Plaintiffs contend the district court erred in barring them "from filing any further proceedings against these Defendants relating to the same subject matter in this district court." The court noted plaintiffs requested leave to amend their complaint in the original action to include the United States as a party, but that Judge Campos found those claims could not survive a motion to dismiss or a motion for summary judgment. The court then found plaintiffs filed this complaint in an attempt to circumvent Judge Campos' ruling, concluding the second filing was an abuse of process warranting filing restrictions.

Plaintiffs do not show their complaint in this case is any different than the proposed amended complaint that Judge Campos did not allow them to file. The filing sanction was narrowly tailored to fit the specific abuse. We conclude the district court did not abuse its discretion in barring plaintiffs from filing further proceedings in federal court in this matter.

AFFIRMED. Plaintiffs' motion to supplement the record is DENIED.

Entered for the Court
Mary Beck Briscoe,
Circuit Judge

APPENDIX B - MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO FILED DECEMBER 30, 1998

No. CIV-98-578 LH/WWD

ROBERT A. LEVY and PHYLLIS B. LEVY
Plaintiffs

vs.

SWIFT TRANSPORTATION COMPANY et al.,
Defendants

THIS MATTER comes before the Court on the Motion to Dismiss filed by the United States (Docket No.21), and the Motion to Dismiss filed by Defendant Tiggs, (Docket No. 4). The Court, having considered the pleadings submitted by the parties, the arguments of counsel, and otherwise being fully advised, finds that both motions are well taken, should be **granted** and that this case must be **dismissed in its entirety**.

I. Procedural and Factual Background

This case represents the Plaintiffs' second attempt to file a lawsuit regarding the same subject matter. This second attempt differs from the first primarily because of the addition of the United states and its agency, the Central Intelligence Agency (CIA), as parties. The first lawsuit was filed in this district court in 1997 and was assigned to the Hon. Santiago Campos. In an attempt to cure their jurisdictional defects in that case, the Plaintiffs sought leave from Judge Campos to amend their Complaint to include the United states as a Defendant. Id. at 8. Judge Campos ruled that the Plaintiffs'

proposed claims against the United states could not survive either a motion to dismiss or a motion for summary judgment" and therefore this amendment of the complaint "would be futile." Id. at 11. Judge Campos dismissed the case without prejudice. *See Levy v. Swift transportation Company, Inc., et al.*, No. 97CV777 (D.N.M.April 28, 1998)(dismissing the prior lawsuit for lack of subject matter jurisdiction because the Plaintiffs had joined a non-diverse defendant).

In the instant lawsuit, Plaintiffs initially filed "Plaintiffs' Original Complaint" (Docket No. 1). A week later, without leave of Court, Plaintiffs filed their "First Amended Complaint". This second complaint, although it contains more conspiracy allegations, is otherwise substantially the same as the proposed complaint that Judge Campos refused to allow Plaintiffs to file in the previous lawsuit. Although it is not properly before the Court, in an attempt to treat these *pro se* litigants liberally, I will analyze the First Amended Complaint.

This Complaint, by its own terms, is for damages suffered by Plaintiffs "in a motor vehicle collision in Grant County, New Mexico, on July 20, 1994, and for other personal injuries and property damage arising out of a conspiracy beginning in 1961 and continuing to the present time". Plaintiffs' First Amended Complaint at Paragraph 3. The accident involved the Plaintiffs, Defendant Nichols (an employee of Defendant Swift) and Defendant Tiggs (another driver). According to Plaintiffs' Complaint, the accident ties all of the Defendants together because the accident was staged and was the result of a conspiracy among all of the named defendants, including the United States and the CIA. (Plaintiffs First Amended Complaint Paragraph 34).

Counts I-IV and VII of the Complaint make allegations against the non-federal defendants only. Count I is for

negligence and is directed against the Swift defendants and Defendant Nichols. Count II alleges negligent entrustment and is directed toward Defendants Swift and Moyes. Count III is for gross negligence and is directed against Defendants Swift, Moyes and Nichols, as is Count IV, a claim for intentional assault and battery. Count VII is a claim for bad faith and is alleged against Defendants Swift and Moyes.

Counts V and VI are for conspiracy and are directed toward both federal and non-federal defendants, as is Count VIII, a claim for spoliation of evidence.

II. Motion to dismiss of the United States

The United states argues that Plaintiffs' claims against it and those against the CIA must be dismissed. As set forth above, only Counts V, VI and VIII are directed against the federal defendants; only these claims will be analyzed by the Court at this juncture.

A. The CIA is Not a Proper Defendant Under the Federal Tort Claims Act

The Government first argues that the CIA is not a proper defendant. Plaintiffs, in their Complaint, assert that this Court has jurisdiction over the United States and its agency the CIA pursuant to the Federal Tort Claims Act (FTCA),28 U.S.C. 1346(b). (Plaintiffs' First Amended Complaint Paragraph 12). The FTCA waives sovereign immunity for tort claims against the United States for money damages for "injury or loss of property" *Id.* However, agencies of the United States are not proper defendants in actions brought under the FTCA. See *Aviles v. Lutz*, 887 F.2d 1046,1048 (10th Cir.1989). The statutory language of section 1346(b) is an explicit waiver of sovereign immunity for suits against the United States only. *See*

Aviles, 887 F.2d at 1048. Furthermore, section 2679(a) of Title 28 explains why any authority a federal agency may possess to sue and be sued "should not be construed to authorize suits against such agency on claims which are cognizable under section 1346(b)." 28 U.S.C. 2679(a). For these reasons, Plaintiffs' claims against the Central Intelligence Agency are **dismissed** for lack of subject matter jurisdiction.[1]

B. Plaintiffs' Claim Contained in Count V is Time Barred

As set forth in 28 U.S.C. 2401(b), a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. *See also* 28 U.S.C. 2675(a). The timely filing of an administrative claim is a jurisdictional requirement. In determining whether an action has been filed within the two-year statute, the threshold inquiry is when the cause of action accrued and federal law, not state law, controls that issue. *Baker v. Board of Regents of the State of Kansas*, 991 F.2d 628,632 (10th Cir.1993). The statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury that is the basis of his action. *See United States v. Kubrick*, 444 U.S. 111, 122 (1979).

The Federal Tort Claims Act requires any person having a tort claim against the United States to present the claim to the appropriate federal agency and await a final denial before initiating court proceedings. 28 U.S.C. 2675(a). The failure of an agency to act on a claim within six months of its submission is deemed a final denial. *Id.* The administrative claim must be

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[1]Plaintiffs have conceded in their Response to the United States' Motion to Dismiss that the CIA may in fact be an improper party defendant.

submitted within two years after it accrues, and the court proceedings must be instituted with six months of final agency action, or be forever barred. 28 U.S.C. 2401(b).

I have carefully reviewed the allegations of Plaintiffs' Complaint. Count V of Plaintiffs' First amended complaint alleges that "[S]ometime prior to the vehicular collision on July 20, 1994," all named defendants conspired to inflict personal injury and property damage on Plaintiffs. Paragraph 34.[2] Count V goes on to state that in furtherance of this conspiracy and to effectuate its objective, the Defendants conspired to stage the referenced vehicular collision, taking certain enunciated steps as set forth in Paragraphs 35 and 36 of the Complaint, on the day of the accident. In Paragraph 37 of the Complaint, Plaintiffs allege that in July 1995 they discovered that the Missouri-Nebraska express (MNX) trucking company was a reputed illegal drug hauler for the CIA. They allege that the evidence will show that the July 20, 1994 "attack" on them was a negotiated condition for the acquisition of the assets of MNX by the Swift Defendants, which acquisition was consummated in the summer of 1994.

The allegations are confusing and difficult to understand, at best. I have taken great care to try to flesh out what the Plaintiffs are alleging. As I read the Complaint, all alleged conspiratorial actions contained in Count V occurred in the summer of 1994, at the latest. Count V contains no allegations of fact tending to show agreement and concerted action at any time after the date of the accident. *See Crosswhite*

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[2]Plaintiffs indicated in the Plaintiffs' Response to Motion to Dismiss by Defendant United States of America (Docket No. 30) that the conspiracy claims they assert are common law torts under the law of the State of New Mexico.

v. Brown, 424 F.2d 495,496-7 (10th Cir. 1970)(Statute of limitations begins to run no later than the date of the last overt act allegedly committed in furtherance of the conspiracy. Court held that a civil conspiracy was untimely).

Plaintiffs contend that they filed a claim against the United States under the FTCA on May 22, 1997 by serving claims on the CIA. Even assuming that such a notice were valid and received by the CIA, which is expressly denied, any purported tort claims against the United States arising out of the 1994 accident are futile because they were not served on the CIA within two years of the occurrence of the accident as required by statute 28 U.S.C. 2401(b). The requirements of the FTCA, including the two-year limit, are jurisdictional, must be strictly construed, and cannot be waived. *Bradley v. United States*, 951 F.2d 268,270 (10th Cir.1991).

Another shortfall found in Count V is that Plaintiffs make only conclusory allegations of conspiracy with no facts pleaded to show the necessary agreement and concerted action. This is inadequate to state a claim for conspiracy. *See Las Luminarias of the N.M. Council of the Blind v. Isengard*, 92 N.M.297,300 (Ct.App.1978)(*citations omitted*). *See also Sooner Products Co. v. McBride*, 708 F.2d 510,512 (10th Cir.1983)(In a Sec. 1983 action conclusory allegations were "insufficient to demonstrate any conspiratorial nexus").

Plaintiffs argue that their claims against the United States involve fraudulent concealment by the CIA of its involvement in the conspiracy that culminated in the 1994 accident. Plaintiffs have alleged with particularity no facts of affirmative conduct by the CIA to conceal its involvement in the alleged conspiracy. *See King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147,1154 (10th Cir. 1981). Furthermore, for a statute of limitations to be equitably tolled

on grounds of fraudulent concealment, a party must show: (1) use of fraudulent means by the party who raised the ban of the statute; (2) successful concealment from the injured party; (3) that the party claiming fraudulent concealment did not know or by the exercise of due diligence could not have known that he might have a cause of action *Id.* Plaintiffs have a burden to show that despite due diligence, some affirmative act prevented their discovery. *Id.* This has not been shown.

Plaintiffs did not file their claim with the CIA in a timely manner nor have they met any of the standards of pleading required to toll the statute of limitations. They have not even sufficiently stated a cause of action for conspiracy. For these reasons, Count V, insofar as it contains claims against the United States, shall be dismissed.

C. Count VI Does not Adequately State a Claim and Must be Dismissed

Count VI contains approximately six pages of stream of consciousness allegations about an alleged conspiracy against Plaintiffs beginning in 1961 and continuing to the present time involving operatives of the CIA, its employees, agents, and contractors, as well as unspecified law enforcement officers of the United States and of the states and municipalities. (Plaintiffs' First Amended Complaint Paragraph 40).

More specifically, count VI contains allegations that the CIA engaged in a campaign of eavesdropping, wiretapping, mail interception, personal surveillance, mail cover, a mind control program on Plaintiffs' children and a conspiracy with a court reporter to produce a false and misleading court transcript. Plaintiffs allege that the CIA has broken into their property and damaged and burglarized their personal property. They allege certain tortious activity by a Mr. Layman, allegedly done at the

behest of the CIA, in furtherance of this amorphous conspiracy. They allege unspecified assaults, make vague reference to a violation of their daughter's civil rights in April 1987, and interference with Plaintiff Robert Levy's employment since 1969. They allege actions by the CIA to prevent Plaintiffs from obtaining their files under the Freedom of Information Act in 1977. Plaintiffs again allege that Defendants planned the July 20, 1994 collision and subsequently conspired with the news media to prevent publication of an account of the accident. They allege that the CIA conspired with Defendants and others to destroy evidence of the accident, to submit fraudulent affidavits in the case previously in front of District Judge Campos, to prevent Plaintiffs from getting adequate legal representation to pursue the instant action, to prevent investigation of the criminal nature of the accident, and to deny information to Plaintiffs when they made requests under the Freedom of Information Act in October of 1996.

In sum, these diverse allegations are that the United States, through its agency, the CIA, conspired to inflict personal injury and property damage on Plaintiffs. While Plaintiffs do not specify in their Complaint any statutory or common law basis for this conspiracy theory, they state in their response Brief that it is asserted under the Federal Tort Claims Act and is a common law tort under the law of the State of New Mexico.

Under New Mexico law, to constitute an actionable civil conspiracy, there must be a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Las Luminarias of the N.M.Council of the Blind v. Isengard*, 92 N.M. 297,300 (Ct.App.1978)(*citations omitted*). Civil conspiracy is not of itself actionable; the gist of the action is the damage arising from the acts done pursuant to the conspiracy. *Id.* Generally, to state a cause of action for conspiracy, the complaint must

allege: (1) the existence of the conspiracy; (2) the wrongful act or acts done pursuant to the conspiracy; (3) the damage resulting from such act or acts. *Silva v. Town of Springer, et al.*, 121 N.M.428,434 (Ct. App. 1996). The existence of the conspiracy must be plead either by direct allegations or by allegations of circumstances from which a conclusion of the existence of a conspiracy may be reasonably inferred. Id.

I have read the six pages of confusing allegations many times; these allegations are largely the same as those that Judge Campos found to be without merit. I am unable to discern what damage allegedly occurred as the result of this supposed conspiracy between the CIA and others. In a civil action for conspiracy, the basis for relief is not the conspiracy but the damages caused by acts committed pursuant to the conspiracy. *Armijo v. National Surety Corp*, 58 N.M. 166 (1954), *cited in Lindbeck v. Bendziunas*, 84 N.M. 21,27 (Ct.App.1972). Plaintiffs seek punitive but not compensatory damages of any kind in this count, a fact that further reinforces the notion that they have suffered no actual damages as a consequence of the alleged conspiracies. I conclude that these rambling, unrelated statements are insufficient to state a claim for a continuing conspiracy against the United States. This claim shall be dismissed.

III. Defendant Tiggs' Motion to Dismiss

All claims against the CIA and the United States shall be dismissed as stated above. This includes allegations against these parties contained in Counts V, VI, and VIII. It is now incumbent on this Court to determine whether this Court possesses subject matter jurisdiction, absent the federal defendants.

The posture of this case is now identical to the posture

of the case when Judge Campos dismissed it for lack of subject matter jurisdiction in April 1998. The remaining parties at this juncture are the Plaintiffs (Texas), Defendant Tiggs (Texas), Defendant Moyes (Arizona), Defendant Nichols (Arizona) and Defendant Swift Transportation (incorporated in Nevada with principal place of business in Arizona). Complete diversity is lacking because of the presence of Defendant Tiggs who is a Texas citizen, as are Plaintiffs. Defendant Tiggs argues that the case be dismissed for lack of subject matter jurisdiction based on the lack of diversity.

Diversity jurisdiction requires complete diversity between all plaintiffs and all defendants. 28 U.S.C. 1332; *Newman-Green, Inc. v Alfonso-Larrain*, 490 U.S.826,829 (1989)(diversity statute must be met for each defendant). The presence of Defendant Tiggs as a defendant from the same state as the Plaintiffs defeats diversity. *See Owen Equipment & erection Co. v. Kroger*, 437 U.S. 365,373 (1978)(Diversity jurisdiction does not exist unless each defendant is a citizen of a different state from each plaintiff).

As stated above, the federal defendants have been dismissed as to all claims directed against them. Consequently this Court has no federal question jurisdiction. Having concluded that complete diversity does not exist, the Court is without a source of jurisdiction over the remaining non-federal defendants and consequently must dismiss all counts directed against them due to a lack of subject matter jurisdiction.[3]

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[3]Count VIII, Spoliation of Evidence, is asserted against the non-federal defendants and against the CIA only. I have already concluded that the CIA is an improper party and there is no diversity jurisdiction over the non-federal defendants. Given these jurisdictional defects, Count VIII must also be dismissed as to all parties.

WHEREFORE, for the above-stated reasons, this case is **dismissed**. Specifically, the Central Intelligence Agency is dismissed as being an improper party. Count V is dismissed as to all named parties because it is time barred. Count VI is dismissed as to all parties due to its failure to adequately state a claim. Count VIII is dismissed against the CIA, an improper party. These three counts are the only ones possibly implicating the federal defendants. Given the dismissal of all possible claims against federal defendants, there can be no federal question jurisdiction. Because Plaintiffs have sued a non-diverse non-federal defendant (Defendant Tiggs), there can be no diversity jurisdiction. Having no subject matter jurisdiction, it is the conclusion of the Court that this case must be dismissed. Pursuant to the Order filed simultaneously with this Memorandum Opinion and Order, Plaintiffs are prohibited from filing any further proceedings against these Defendants relating to the same subject matter in this district court

IT IS SO ORDERED,

LeRoy Hansen,

UNITED STATES DISTRICT JUDGE

APPENDIX C - MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO FILED MAY 14, 1999

No. CIV-98-578 LH/WWD

ROBERT A. LEVY and PHYLLIS B. LEVY
Plaintiffs

vs.

SWIFT TRANSPORTATION COMPANY et al.,
Defendants

THIS MATTER comes before the Court on Plaintiffs' Rule 59 Motion to Alter or amend Judgment (Docket No. 44). The final Judgment in this matter was filed on December 30, 1998 and Plaintiffs filed the aforesaid motion on January 11, 1999. The Court, having reviewed Plaintiff's objections and the Defendants' responses thereto, finds Plaintiffs' arguments to be without merit. Accordingly, the Plaintiff's Rule 59 Motion to Alter or Amend Judgment shall be **denied**.

Discussion

Rule 59 requires that motions such as this be filed, not served within 10 days, following entry of judgment. Schudel v. General Elec. Co., 120 F.3d 991 (9th Cir.1997). No extensions may be allowed to this 10 day rule. See Rule Fed.R.Civ.P.6(b). Because rule 59(e) requires filing (not service) no later than 10 days after entry of judgment, the 3-day service-by-mail extension under Rule 6(e) does not apply. Adams v. Trustees of New Jersey Brewery Employees' Pension trust Fund, 29 F.3d 863,870-71 (3rd Cir.1994).

Because the motion was filed late, I will evaluate this motion under Rule 60(b). See United States v. Emmons, 107 F.3d 762,764 (10th Cir.1997). As noted in Hatfield v. Board of County Commissioners for Converse County, 52 F.3d 858,861 (10th Cir.1995), if a motion is filed within ten days of the district court's entry of judgment, the motion is treated as a motion to alter or amend the judgment under Fed.R.Civ.P. 59(e). Alternatively, if the motion is filed more than ten days after the entry of Judgment, it is considered a motion seeking relief from the judgment under Fed.R.Civ.P. 60(b).

Rule 60(b) provides relief to a party from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Plaintiffs assert four grounds for alteration or amendment of the judgment. First, because they wish to have additional time in which to bring an action in state district court. Second, because they seek another opportunity to file an amended complaint. Third, they re-argue the issue of jurisdiction over the non-federal defendants, and, finally because they want to ensure that this Court's judgment does not prejudice their claims under New Mexico law in state court.

Having read the briefs of Plaintiffs, the Court concludes that none of their stated reasons qualifies for relief under Rule 60(b). Accordingly, their motion shall be denied.

WHEREFORE, IT IS HEREBY ORDERED that Plaintiffs' Rule 59 Motion to Alter or Amend Judgment (Docket No.44) is hereby **denied**.

IT IS SO ORDERED

LeRoy Hansen,
UNITED STATES DISTRICT JUDGE

APPENDIX D - MEMORANDUM OPINION AND ORDER STAYING DISCOVERY UNITED STATES DISTRICT COURT DISTRICT OF NEW MEXICO FILED OCTOBER 16, 1998

No. CIV-98-578 LH/WWD

ROBERT A. LEVY and PHYLLIS B. LEVY
Plaintiffs
vs.
SWIFT TRANSPORTATION COMPANY et al.,
Defendants

This matter comes before the Court upon a motion by the United States of America to stay discovery pending ruling on jurisdictional matters [docket no.35] filed October 2, 1998. A fully briefed motion to dismiss filed by the United States was docketed August 10, 1998. In a case involving some of the same claims but not all of the same parties, Judge Campos, *sua sponte*, determined that Plaintiffs' claims against the United States in an amended complaint could not survive either a motion to dismiss or a motion for summary judgment. Since there are definite questions as to the liability of Plaintiffs' claims, I find that a stay would be appropriate. If the stay that I enter needs to be extended, that matter can be addressed later.

WHEREFORE, IT IS ORDERED that all discovery, including initial disclosures, shall be stayed until and including December 18, 1998.

IT IS FURTHER ORDERED that the Initial Scheduling Order entered herein on August 24, 1998, is vacated and set aside.

William W. Deaton,
UNITED STATES MAGISTRATE JUDGE

APPENDIX E - ORDER DENYING REHEARING, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED NOVEMBER 15, 1999

Appeal No. 99-2167
D.C. No. CIV-98-578 (D.N.M.)

ROBERT A. LEVY and PHYLLIS B. LEVY
Plaintiffs-Appellants

vs.

SWIFT TRANSPORTATION COMPANY et al.,
Defendants-Appellees

Before ANDERSON, KELLY, and BRISCOE
Circuit Judges

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed.R.App.P.35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied

Entered for the Court
PATRICK FISHER, Clerk of Court

by: Deputy Clerk

APPENDIX F - PORTION OF PLAINTIFFS' PROPOSED SECOND AMENDED COMPLAINT INCLUDED AS EXHIBIT A OF THEIR REPLY BRIEF FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO FILED FEBRUARY 25, 1999

No. CIV-98-578 LH/WWD

ROBERT A. LEVY and PHYLLIS B. LEVY
Plaintiffs

vs.

SWIFT TRANSPORTATION COMPANY et al.,
Defendants

FIFTH CLAIM

CONSPIRACY

32. Plaintiffs incorporate paragraphs 1 through 31 by reference as though fully set forth herein.

33. Sometime prior to the vehicular collision on July 20, 1994, in which plaintiffs were injured, the United States Central Intelligence Agency (CIA) entered into an agreement with defendants NICHOLS, TIGGS, MOYES, SWIFT-P, SWIFT-S, and with other persons unknown to plaintiffs for the purpose of planning and executing an attack on plaintiffs with a motor vehicle.

34. In furtherance of this agreement and to effect the objects thereof, said defendants arranged to stage the referenced vehicular collision, as follows:

A. On July 20, 1994, plaintiffs were traveling eastbound in the right lane of Interstate Highway 10 in a private automobile. Plaintiff PHYLLIS was driving, and her husband plaintiff ROBERT was seated in the front passenger seat.

B. Under the supervision and sponsorship of the CIA and defendants MOYES, SWIFT-P, and SWIFT-S, defendants NICHOLS and TIGGS planned and arranged with each other to track and follow plaintiffs in their vehicle until a predetermined location was reached, approaching the Separ Interchange, at Milepost 42 on Interstate Highway 10 in Grant County, New Mexico. At said predetermined location, defendant TIGGS, operating a red 1993 Toyota Tercel automobile, equipped with a large overhead radio antenna, traveling in front of plaintiffs' vehicle in the right lane, slowed his vehicle for the purpose of forcing plaintiff Phyllis to move into the left lane. As plaintiffs' vehicle approached and overtook Tiggs' vehicle, plaintiff PHYLLIS did in fact move her vehicle into the left lane in order to pass TIGGS' vehicle. When plaintiff PHYLLIS had moved her vehicle into the left lane and pulled alongside defendant TIGGS' vehicle to pass it, defendant TIGGS accelerated his vehicle to maintain its position alongside and side-by-side with plaintiff PHYLLIS' vehicle, so as to prevent her from returning to the right lane. Defendant NICHOLS had his tractor-trailer combination positioned in the left lane behind the two vehicles, approaching at an excessive speed. As defendant TIGGS then pulled ahead of plaintiffs' vehicle, per radio-telephone directions from defendant NICHOLS, defendant NICHOLS swung his rig around plaintiffs' vehicle and cut in front, so as to side-swipe plaintiffs' vehicle with the left rear wheels of his trailer, causing plaintiffs' vehicle to skid, overturn, and roll over.

35. Defendant United States of America owed a duty to all persons to supervise its agencies and subdivisions in such a

way that they execute policies consistent with the Constitution and laws of the United States and with the dictates of common law. The United States of America breached its duty to supervise its agencies by failing to prevent the Central Intelligence Agency from involving itself in a conspiracy to injure plaintiffs.

36. At the time of and immediately after the above-described acts by these defendants, the only participants known to plaintiffs and developed through their investigations were defendants TIGGS, NICHOLS, MOYES, SWIFT-P and SWIFT-S. However, in July, 1995, plaintiffs discovered that the Missouri-Nebraska Express (MNX) trucking company was a reputed illegal drug hauler for the CIA. Plaintiffs allege that evidence will show that execution of the attack on them on July 20, 1994, by defendants Nichols and Tiggs, was a negotiated condition among SWIFT-S and/or Swift-P, MOYES, MNX, and CIA, for the acquisition of the assets of MNX by SWIFT-P and/or SWIFT-S, which acquisition was consummated in the summer of 1994.

37. In order to conceal from plaintiffs the existence of a conspiracy and its involvement in said attack on plaintiffs, the CIA took the following fraudulent and illegal steps:

A. In collaboration with the other defendants it planned the collision of July 20, 1994, to make it look like an accident. By arranging the collision to occur at a freeway interchange, defendants would be able to allege that the truck driven by defendant NICHOLS was changing lanes to allow a vehicle to enter from the interchange on-ramp, and that plaintiff PHYLLIS was at fault for not slowing her vehicle to allow NICHOLS' vehicle to change lanes safely. The CIA thus insulated itself from involvement in the conspiracy, because there would be no conspiracy, no intentional tort, only an

ordinary accident involving carelessness on both sides. If plaintiffs survived and discovered the intentional tort, it would only involve the visible actors, defendants NICHOLS, TIGGS, and the SWIFTS, none of whom had any observable connection to the CIA.

B. The CIA arranged with the investigating officer, J.L. Whatley of the New Mexico State Police, to advise plaintiff PHYLLIS that she was partially at fault, because she failed to apply the brakes, when plaintiffs returned to the accident scene to investigate the circumstances of the collision on August 18, 1994.

C. The CIA arranged with the news media, specifically the local Deming, New Mexico newspaper, to refrain from publishing an account of the accident, despite its spectacular nature, to make sure that no possible witnesses came forward, and further, caused employees of the State of New Mexico to fail to report the accident to the Federal Highway Administration.

D. The CIA arranged with defendants Swift to destroy evidence relating to the accident and to dispose of the tractor and trailer involved, during 1995 and 1996.

E. The CIA arranged with agent Stan Zernicke of the El Paso, Texas office of the Federal Bureau of Investigation to refrain from investigating the criminal nature of the accident when requested to do so by plaintiffs in May, 1995, despite the fact that the FBI was then conducting an investigation of staged accidents (Operation Sudden Impact). Instead, agent Zernicke referred plaintiffs to the Interstate Commerce Commission.

F. On October 25, 1996, defendant CIA

affirmatively concealed its involvement in the accident of July 20, 1994, and all other wrongful acts against plaintiffs, by denying their requests under the federal Freedom of Information Act. Copies of such denials were attached as Exhibit C of plaintiffs' original complaint herein.

G. Defendant CIA conspired with the Federal Bureau of Investigation to deny information to plaintiffs when they requested such information from the FBI under the federal Freedom of Information Act in 1996.

H. The CIA prevented plaintiffs from obtaining adequate legal counsel, advice, and representation, thereby concealing from plaintiffs the information necessary to timely file their administrative claims. The CIA created a climate in the legal profession ("nobody sues the CIA") such that no attorney would disclose the limitations requirements of or even the existence of the Federal Tort Claims Act to plaintiffs. Although plaintiffs contacted numerous attorneys, including Harry T. Petersen, El Paso, TX; Robert Q. Hoyt, Tucson, AZ; Teri L. Kessel, Phoenix, AZ; Dean M. Cavaletto, Phoenix, AZ; Gerry L. Spence, Jackson, WY; Joseph Arshawsky, Albuquerque, NM; Michael W. Lilley, Las Cruces, NM; Kyle W. Gesswein, Las Cruces, NM; Angel Saenz, Las Cruces, NM; and Neil Weinbrenner, Las Cruces, NM, none was willing to take plaintiffs' case with allegations of intentional tort or conspiracy. And although plaintiffs had told several about the involvement of the CIA prior to July 20, 1996, similarly none informed plaintiffs of the need to comply with the FTCA or even of its existence. And although plaintiffs attempted to obtain legal assistance in preparing this second amended complaint, no attorney in the Dona Ana County Bar Association was willing to provide such assistance.

I.. In a further effort to evade a lawsuit under the

FTCA and to evade its responsibility to investigate plaintiffs' claims, the CIA refused to acknowledge its receipt of plaintiffs' administrative claims, although such claims were received by the CIA sometime between May 23, 1997 and June 5, 1997. The CIA enlisted the aid of the US Postal Service in its illegal efforts to cover up its receipt of plaintiffs' claims.

38. The measures taken by the CIA as set out herein in Paragraph 37. were successful in concealing the involvement of the CIA in the staged accident of July 20, 1994, from plaintiffs. It was not until July 1995, when plaintiffs serendipitously discovered a connection between the Swift defendants and the CIA that a corner of the veil of secrecy was slightly lifted. Until that time, except for vague suspicions, plaintiffs did not know and by due diligence could not have known of the involvement of the Central Intelligence Agency in the collision that occurred on July 20, 1994.

39. The above-described acts on the part of the CIA and defendants NICHOLS, TIGGS, MOYES, SWIFT-P, and SWIFT-S, and unnamed co-conspirators, and as the responsible party, defendant USA, in conspiring to injure or kill plaintiffs, and in carrying out said conspiracy by causing the Freightliner tractor-trailer rig operated by defendant NICHOLS to strike plaintiffs' vehicle and whack it off the highway, causing plaintiffs' injuries and damages, constitute intentional tortious acts of such an egregious nature that plaintiffs are therefore entitled to recover, in addition to actual damages already enumerated, punitive damages against all defendants, jointly and severally, in an amount to be established at trial, but not less than $100,000,000.

SIXTH CLAIM

CONTINUING CONSPIRACY

40. Plaintiffs incorporate paragraphs 1 through 39 by reference as though fully set forth herein.

41. The attack on plaintiffs described in the Fifth Claim was not an isolated incident involving the CIA. Over a period of years, from 1961 to the present time, the CIA has conspired to engage in and has engaged in, along with its employees, agents, contractors, law enforcement officers of the United States and of the states and municipalities, and other persons named or unnamed herein, the following additional unlawful acts against plaintiffs, thereby making all defendants liable therefor and establishing a status quo of continuing injury to plaintiffs:

A. Beginning in 1961, when plaintiff ROBERT became employed by the National Company, Inc. of Melrose, Massachusetts, the CIA conspired with its agents, the Federal Bureau of Investigation, and local law enforcement agencies to conduct a campaign of surveillance on plaintiffs and their children. Said campaign consisted of but was not limited to eavesdropping, wiretapping, mail interception, personal surveillance, and mail cover. These activities were conducted at plaintiffs' residences and workplaces in Massachusetts, (the nation of) Israel, Ohio, New Mexico, California, and Texas, and have continued to the present time. The information obtained from these activities has been used to harass plaintiffs, attempt to control their thinking and behavior, prejudice their friends and relatives, and adversely affect their relationships with their children. Recent example: on December 14, 1996, U.S. Postal Service letter carrier Mike Brown failed to deliver mail to plaintiffs' residence to prevent delivery of a certified letter

containing documents plaintiffs needed for a hearing in California on December 17, 1996. These activities have caused severe emotional distress to plaintiffs and damage to their reputations in an amount to be established at the trial of this issue but not less than $1,000,000.

B. During the same time period and continuing to the present time, the CIA and its agents conducted an extensive mind control program on plaintiffs' children, causing their emotional development to be adversely affected and resulting in damage to family relationships and personal development. Plaintiffs' daughter Carolyn has been intimidated and manipulated by her former husband, acting in concert with the CIA and others, into keeping her children away from their maternal grandparents (plaintiffs). The CIA conspired with court reporter Cynthia R. Smith to produce a false and misleading transcript of court proceedings of April 8, 1997, in Case No. SOD 110048, Superior Court of Los Angeles County, California. These activities have resulted in severe emotional distress to plaintiffs of an amount to be established at trial but not less than $1,000,000.

C. During the same time period the CIA and its agents conspired to conduct numerous break-ins at plaintiffs' residences, automobiles, and rental properties, damaging and burglarizing plaintiffs' personal property. The most recent such campaign began in 1990, when the CIA secretly arranged for Larry Layman to occupy a rental unit owned by plaintiffs, located at 1615 N. Mesa St, El Paso, Texas, for the purpose of harassing plaintiffs. Mr. Layman was responsible for or played a part in a break-in at plaintiffs' residence on December 12, 1992, and again on January 21, 1994. Mr. Layman acquired a dog, which he trained to attack plaintiff ROBERT. On March 21, 1996 and again on August 2, 1996, said dog bit plaintiff ROBERT on the leg, producing lacerations and requiring

medical treatment. After the second bite, plaintiff evicted Mr. Layman from his apartment. On June 18, 1996, shortly after plaintiffs enlisted the aid of their congressman to try to obtain their files from the CIA, the CIA in retaliation had Mr. Layman and his friends smash the hatchback window of plaintiffs' 1980 Mazda automobile. On January 24, 1997, Mr. Layman, at the behest of defendant CIA, broke into the apartment he had vacated and stole tools and furnishings plaintiffs were using to renovate the apartment. In addition, as of the date of submission of this Second Amended Complaint, plaintiffs have been unable to rent the apartment vacated by Mr. Layman in August, 1996, because the CIA has spread information to discourage prospective tenants from doing business with plaintiffs. Plaintiffs have suffered property damage, personal injury to plaintiff Robert Levy from the dog bites, and emotional distress to both plaintiffs in an amount to be established at trial, but not less than $1,000,000.

D. The CIA and its agents conspired to intimidate prospective employers into depriving plaintiff ROBERT of employment in his profession as a physicist since 1969. The inability of plaintiff Robert Levy to secure gainful employment has deprived him of salary income for the thirty-year period from 1969 to 1999, in an amount to be established at trial but not less than $1,000,000.

E. The CIA and its agents have engaged in numerous specific tortious acts against plaintiffs. Among these are a conspiracy with Lawrence Roy Rubidoux and other persons to attack plaintiffs and their daughter Teresa with a motor vehicle on June 14, 1979, on Interstate Highway 5 in Kern County, California, and a conspiracy with the City of Los Angeles and County of Los Angeles to deprive plaintiffs and their daughter Robin of their civil rights in April, 1987, in Los Angeles, California.

42. In furtherance of its campaign against plaintiffs, and to fraudulently conceal its involvement in the above-described wrongful activities, defendant CIA:

A. Concealed its association with the National Radio Company (National Company, Inc. of Melrose, Massachusetts), so that plaintiff ROBERT knew nothing of such connection when he accepted employment there. When plaintiff ROBERT later sued the National Company for breach of employment contract, he lacked the information needed to include USA as a defendant. For the next thirty-five years, the CIA was successful in keeping its identity as the harassing agency against plaintiffs concealed from them, depriving plaintiffs of a substantive basis for instituting a legal action against the United States.

B. On May 9, 1977, the CIA affirmatively concealed its involvement in any activity against plaintiffs when plaintiffs requested their files under the Freedom of Information Act, by denying any such involvement. A copy of such denial was attached as Exhibit B of plaintiffs' original complaint herein.

43. The above-described acts constitute intentional tortious conduct of such an egregious nature that plaintiffs are therefore entitled to recover, in addition to actual damages, punitive damages against all defendants, jointly and severally, in an amount to be established at trial, but not less than $100,000,000. Furthermore, plaintiffs are entitled to injunctive relief from this court to enjoin any further acts of the type above-enumerated or any other tortious acts by these defendants against plaintiffs and all other persons similarly situated, and by establishment of a reconciliation commission to investigate, grant immunity, and bring to light past unlawful acts.

APPENDIX G - PLAINTIFFS' NOTICE OF APPEAL UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO FILED MAY 19, 1999

No. CIV-98-578 LH/WWD

ROBERT A. LEVY and PHYLLIS B. LEVY
Plaintiffs

vs.

SWIFT TRANSPORTATION COMPANY et al.
Defendants

Notice is hereby given that ROBERT A. LEVY and PHYLLIS B. LEVY, plaintiffs in the above-named case, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the Final Judgment entered in this action on the 30th day of December, 1998.

Plaintiffs also appeal the Order denying plaintiffs' Rule 59 Motion to Alter or Amend Judgment, entered May 14, 1999, Docket No. 55, the Order barring plaintiffs from further filings in this case entered May 14, 1999, Docket No. 56, and the Order denying assignment of judge entered Dec. 30, 1998, Docket No. 39.

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Supreme Court, U.S.
FILED
FEB 29 2000
CLERK

No. 99-1356

IN THE

Supreme Court of the United States

ROBERT A. LEVY and PHYLLIS B. LEVY,

Petitioners,

v.

SWIFT TRANSPORTATION COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT EDDIE LEE TIGGS

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STATEMENT OF THE CASE

A. Statement of Facts

Petitioners' Statement of Facts (Pet., pp. 3-4) is a self-serving declaration of their view of the facts and their actions. Nonetheless, Respondent Tiggs will accept the Statement of Facts regarding the Levys' own actions for the purposes of this Petition, only. Notwithstanding, Tiggs has consistently denied, and continues to deny, any knowledge of, or participation in, the accident which Petitioners maintain is the basis for their lawsuit.

B. Proceedings Below

Petitioners initially cite their first Complaint filed on June 6, 1997[1] and correctly note that in that case they invoked federal jurisdiction claiming diversity of citizenship under 28 U.S.C. § 1332, and supplemental jurisdiction under 28 U.S.C. § 1367. Pet., p. 5.

In the initial Complaint, and every subsequent or proposed amended complaint in that lawsuit, their second federal case,[2] and their state court lawsuit,[3] Petitioners'

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1. *Levy v. Swift, et al.*, CV-97-777 SC/JHG, U.S. District Court, District of New Mexico (*Levy I*) (*see*, Pet., p. 5).

2. *Levy v. Swift et al.*, CV-98-578 LH/WWD, U.S. District Court, District of New Mexico, filed May 15, 1998 (*Levy II*) (*see*, Pet., p. 5).

3. *Levy v. Swift et al.*, CV-99-90, Third Judicial District Court, State of New Mexico, filed January 28, 1999 (*Levy III*) (*see*, Pet., p. 6, fn. 1).

jurisdictional allegations regarding their residence and that of Tiggs has been the same: Levys are residents of Texas;[4] so is Tiggs.[5] Petitioners have now properly dropped their diversity claim. Pet., p. 2, "Basis for Federal Jurisdiction in the Court of First Instance."

Petitioners now rely exclusively on jurisdiction under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b). They also seek supplemental jurisdiction over purely state law claims under 28 U.S.C. § 1367. Pet., p. 2.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE RECEIVED ALL THE PROCESS THEY ARE DUE; THE FEDERAL COURTS HAVE NO JURISDICTION TO GIVE THEM MORE.

Petitioners erroneously assert that their case has been "adjudicated." Pet., p. 9 (headnote). There has been no adjudication on the merits because the federal courts have never had jurisdiction to decide the case.

There is also severe question whether Petitioners have properly appealed the lower courts' decision that there is no

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4. *Levy I*: Compl., ¶ 4; Petitioners' proposed First Amended Complaint, ¶ 4 (attached to Mtn. for Lv. to File Am. Compl.). *Levy II*: Petitioners' original Compl., ¶ 4; First Am. Compl., ¶ 4. *Levy III*: Civil Compl., ¶ 4.

5. *Levy I*: Compl., ¶ 9; Petitioners' proposed First Am. Compl., ¶ 9, attached to Mtn. for Lv. to File Am. Compl. *Levy II*: Petitioners' original Compl., ¶ 9; Petitioners' First Am. Compl., ¶ 9. *Levy II*: Compl., ¶ 9.

jurisdiction under the FTCA. The district court dismissed the United States and Central Intelligence Agency for lack of FTCA jurisdiction. Pet., Appendix B, pp. 10a-14a. Although Petitioners appealed the dismissal, the Tenth Circuit specifically noted that they did not appeal the ruling of lack of subject matter jurisdiction under the FTCA. (Pet., Appendix A, p. 3a: "Plaintiffs do not appeal the court's dismissal of Defendant CIA for lack of subject matter jurisdiction under the Federal Tort Claims Act.") Despite their assertion to the contrary (Pet., p. 2), Petitioners' failure to appeal this portion of the decision now makes the District Court's conclusion on FTCA jurisdiction the law of this case.

Nonetheless, Petitioners' own Statement of Facts amply demonstrates that they cannot avoid the effect of the FTCA statute of limitations. They set forth the following chronology: the accident occurred on July 20, 1994. Levys immediately determined that "The circumstances of the accident indicated that it was not a case of negligence, but was the result of an orchestrated plan or conspiracy. During the following months [,] the Levys attempted to collect the facts." Pet., p. 3. Petitioners had previously become suspicious "that they had been targets of the Central Intelligence Agency ever since Robert Levy worked for the National Radio Company in the 1960's." Pet. p. 4; *see also*, Pet. App. F, p. 29a, ¶ 38.

By their own admission, Petitioners knew of or suspected the CIA as the architect of the accident on the day it happened. Pet., p. 4. They had suspected a CIA plot since the 1960's, 33 years. *See* Pet., p. 4; p. 30a, ¶ 41. Even according them all benefit of the doubt, they admittedly had their suspicions confirmed a year after the accident, when they read *Defrauding America*. Pet., p. 3. This left them an

additional year to conduct whatever further investigation they wished and file a timely claim under the FTCA by July 1996.[6] They waited until May 1997, three years after their claim accrued.

Petitioners' contention that they were unaware of any legal basis or requirement to file their claim within two years of the accident was disposed of by this court in *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979).

Petitioners now claim that the district court denied them the opportunity to obtain or present evidence on the question of a timely claim. Pet., p. 10. They argue that they had no opportunity to show due diligence. *Id.*

The fact of the matter is that Petitioners argued their position thoroughly in pleadings to the District Court, Court of Appeals, and now this Court. *See,* Pet., p. 4. Their own statements of fact condemn their argument and establish lack of compliance with the Act as well as lack of diligence.

Petitioners have not hinted at any discovery which would rebut their own admissions. Any explanations or evidence they could possibly offer must already be in their possession, because it is all a matter of their own decision-making, not evidence someone else would have. No one but the Levys can explain why — given thirty-some years of experience and suspicions, plus their perceived confirmation of those suspicions in 1995 — they waited three years to send their claim to the CIA.

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6. Tort claims against the U.S. "forever barred" unless presented to appropriate federal agency within two years of accrual. 28 U.S.C. § 2401(b).

Petitioners' position is similar to that of the plaintiffs in *Gibson v. United States*, 781 F.2d 1334 (9th Cir., 1986), *cert. den.*, 479 U.S. 1054, 107 S. Ct. 928, 93 L. Ed. 2d 979 (1987). Gibsons sued municipal defendants and the FBI under several theories, including the FTCA, for (among other things) burning their garage in 1974. They waited until March 1979 to file their claim with the FBI, contending they were unaware of the Bureau's involvement in the fire until 1977. They maintained that the FBI actively concealed its involvement from them.

Gibsons knew that the fire was arson. This alone was sufficient to alert them to the fact of their injury (a burned garage) and its cause (fire) under the *Kubrick* test. The information they received shed no new light on either fact, it only identified the individual culprit, an FBI agent. The Court stated, ". . . plaintiffs would have us stretch the boundaries of the *Kubrick* decision to delay accrual of a federal claim until a plaintiff knows or has reason to know of the culpability of federal agents." 781 F.2d at 1344.

The *Gibson* court went on to note that under the FTCA, the cause of action accrues when the fact of injury (damage to garage in *Gibson;* injury and property damage in Levys' case) and immediate physical cause (fire in *Gibson*; auto accident in *Levy*) are known. Ignorance of involvement by federal employees is irrelevant. *Id.*

The court also noted that unless the Gibsons could establish fraudulent concealment, their claim was time barred. To prove fraudulent concealment, plaintiffs had to plead, with particularity, the circumstances surrounding the concealment and recite facts showing their due diligence in attempting to uncover those facts. The court found there was

no fraudulent representation because the plaintiffs knew about the incendiary device shortly after the fire. In addition, they failed to recite diligent efforts within the limitations period to identify the source of the fire.

The situation for the Levys is parallel. They knew of the fact of their injury and its cause on the day of the accident. Pet., p. 3. Their cause of action accrued that day. *Kubrick*, *supra*. Levys' "alleged ignorance of the involvement of United States employees was irrelevant." *Gibson*, 781 F.2d at 1344, *quoting Dyniewicz v. United States*, 742 F.2d 484, 487 (9th Cir. 1984).

The Tenth Circuit Court of Appeals correctly affirmed the District Court's dismissal of Petitioners' Complaint.

II.

PETITIONERS' PROPOSED AMENDMENT TO THEIR COMPLAINT WILL NOT CREATE JURISDICTION WHERE THERE IS NONE; IT WOULD BE FUTILE.

Petitioners initially assert that this court allows liberal amendment of complaints by *pro se* litigants under Federal Rule of Civil Procedure 15(a). They cite *Boag v. MacDugal*,[7] 454 U.S. 364, 102 S. Ct. 700, 70 L. Ed. 2d 551 (1982), and *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). *MacDugal* is not a Rule 15(a) case; does not refer to amendment of the Complaint; and, does not contain the quotation ascribed to it. *Compare,* Pet., p. 11. *Foman* is not a Rule 15(a) case, either. While the Court does hold that

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7. Cited by Petitioners as "*Boaz v. MacDugal.*"

"outright refusal to grant the leave [to amend] without any justifying reason" is an abuse of discretion, Levys omit the fact that the District Court in this case had ample reason for its refusal to allow amendment: the attempt would have been utterly futile.

In both *Levy I* and *Levy II*, the District Courts found that Petitioners' conspiracy allegations did not state a claim upon which relief could be granted. There were several reasons: there is no independent tort of civil conspiracy in New Mexico;[8] amendment would be futile (Pet., App. B, pp. 8a-9a); and, Petitioners apparently suffered no actual damages (Pet., App. B, p. 16a). The proposed new allegations in the proffered Second Amended Complaint (Pet., App. F, pp. 30a-33a) demonstrate no new allegations or reasons to change the District Courts' holdings. Even if Petitioners' contention regarding the Tenth Circuit's decision on their Rule 59 motion (App. A, at pp. 5a and 6a) were correct, a review of the proposed Second Amended Complaint (Pet., App. F) amply demonstrates that the Levys' latest efforts would also be futile.

The proposed Second Amendment does not correct any of the fatal defects in any of the previous complaints. Regardless, even an effective allegation of conspiracy would not overcome the fundamental flaw in Petitioners' case: they did not give timely notice to the CIA; their claim is forever barred. 28 U.S.C. § 2401(b).

As the Tenth Circuit noted, once the District Court properly dismissed the FTCA claim, it properly exercised

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8. *Levy II*, Appendix B, p. 15a; *Las Luminarias of the N.M. Council of the Blind v. Isengard*, 92 N.M. 297, 587 P.2d 444 (Ct. App. 1978).

its discretion to decline supplemental jurisdiction. Pet., App. A, p. 5a. The other decisions upon which Petitioners rely are distinguishable from the instant case in that in those cases, the courts were deciding issues where they had subject matter jurisdiction.

It is also worthy of note that Petitioners admit that they are not without a forum for their complaints against the non-federal defendants. They have already filed their Complaint in New Mexico State Court, *Levy III*. Pet., p. 6, fn. 1.

CONCLUSION

Petitioners' claims are neither new, novel, nor of "exceptional importance." They have long ago been litigated and decided. *E.g., Gibson, supra,* and *Dyniewicz, supra.* The District Court and Tenth Circuit correctly determined that there was no basis for federal court jurisdiction over their claims. Petitioners have received all the process which they are due. Denial of the Petition for Writ of Certiorari is appropriate. Petitioners have presented no valid reason to revisit the issues they attempt to raise.

Respectfully submitted,

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No. 99-1356

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In The

Supreme Court of the United States

ROBERT A. LEVY and PHYLLIS B. LEVY,

Petitioners,

vs.

SWIFT TRANSPORTATION COMPANY
(Sparks, Nevada), et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' ARGUMENT

I.

RESPONDENTS HAVE GIVEN NO REASON WHY PETITIONERS SHOULD NOT HAVE THE OPPORTUNITY TO PRESENT EVIDENCE.

Initially respondents quibble about the Levys' use of the word "adjudicate," apparently implying that since there was no adjudication on the merits, no evidence is necessary. But the question of jurisdiction was in fact adjudicated, and as pointed out in their Petition, Pet.p.10, the non-moving party must have the opportunity to present evidence relative to jurisdiction.

Secondly, the dismissal of the CIA was not appealed because the CIA could not be a proper party in an FTCA action. This had no effect on the validity of other aspects of the Levys' appeal in the Tenth Circuit.

Respondents say that since the Levys discovered the CIA connection in July, 1995, "this left them an additional year to conduct whatever further investigation they wished and file a timely claim under the FTCA by July 1996" (Brief in Opposition, pp.3-4). But under respondents' argument, suppose the Levys had not discovered the CIA connection until August, 1996; how much time would they then have had to file a timely claim? In fact, the date of discovery of the CIA connection in July 1995 was the date their case accrued, and the filing of their claims to the CIA in May, 1997 was therefore timely.

Respondents cite *Gibson v. United States*, 781 F.2d 1334,1344 (9th Cir. 1986) as a parallel situation for this case. The Levys agree that parallels do exist with respect to the date

of accrual, but not with respect to fraudulent concealment.

Respondents failed to note an important distinguishing feature of the *Gibson* matter: the *Gibson* court, because of **"binding circuit precedent"** foreclosed itself from considering language in *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) which "supports plaintiffs' [and thereby the Levys'] proposed construction," *Gibson*, at 1344. Since the *Gibson* case was in the Ninth Circuit, such binding precedent would not hold in the Tenth Circuit, where the Levys' case was heard, or in this Court. Because of the parallels noted by respondents, the *Gibson* case thus supports the Levys' contention that under *Kubrick*, their cause of action did not accrue until July, 1995, when they discovered the CIA connection. The Levys must be given an opportunity to present evidence of concealment by the government and of their own diligence in seeking to expose such concealment.

The other case cited by respondents and by *Gibson*, namely *Dyniewicz v. United States*, 742 F 2d 484,486 (9th Cir. 1984), also supports the Levys' position, because it recognizes the significance of *Liuzzo v. United States*, 485 F.Supp. 1274 (E..D. Mich.1980)(claim did not accrue until plaintiffs had reason to believe government agent was person who caused injury where agent and other government officials, including the President, had asserted that other persons were responsible).

The parallel with *Gibson* does not extend to the question of fraudulent concealment. Here it is necessary that plaintiffs have the opportunity to obtain evidence in support of the claim of due diligence.

II.

RESPONDENTS HAVE GIVEN NO REASON WHY PETITIONERS SHOULD NOT BE ALLOWED TO AMEND THEIR COMPLAINT.

The quotation ascribed to *Boag v. MacDugal*, 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed. 2d 551 (1982) should have been ascribed to *Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed. 163,169 (1980). Both cases were cited in *Eldridge v. Block*, 832 F.2d 1132, 1135-1137. The *Eldridge* court, at 1135-1137, went to great pains to point out that "a court must be guided by the underlying purpose of Rule 15--to facilitate decision on the merits rather than on the pleadings or technicalities," and that "this policy is applied even more liberally to pro se litigants," and that "Courts in fact 'provide a pro se litigant with notice of the deficiencies in his or her complaint' to ensure that the litigant uses the opportunity to amend effectively," and that "the Supreme Court has instructed the federal courts to liberally construe the 'inartful pleading' of pro se litigants."

The defect in plaintiffs' complaint pointed out by Judge Hansen was that it failed to allege actual damages. Pet., p.16a. This defect was corrected in the proposed Second Amended Complaint, Pet., pp. 30a-33a, contrary to respondents' assertion.

Moreover, since the proposed Second Amended Complaint contains allegations of tortious acts subsequent to June, 1995, Pet., pp.30a-33a, the Levys' notice to the CIA on or before June 6, 1997, was timely.

As for *Levy III*, respondents have moved for summary judgment on statute of limitations grounds, apparently ignoring plaintiffs' invocation of State and Federal saving statutes and

their request that the State court take judicial notice of the two federal cases, *Levy I* and *Levy II* in their Complaint. And, as respondents noted, it is only the non-federal defendants which are subject to the jurisdiction of the State court.

CONCLUSION

The Levys have refuted all of respondents' substantive arguments against their Petition. Accordingly, they respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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